

Education Administration & Planning 1

Amendment No. 1 to HB0789

Brooks H
Signature of Sponsor

AMEND Senate Bill No. 824

House Bill No. 789*

by deleting all language after the enacting clause and substituting instead the following:

SECTION 1. This act shall be known and may be cited as the "Student Due Process Protection Act."

SECTION 2. Tennessee Code Annotated, Section 4-5-301(d), is amended by adding the following language to the subsection:

The office of the secretary of state shall grant a request by a public institution of postsecondary or higher education to have an administrative judge or hearing officer employed in the office of the secretary of state hear a contested case.

SECTION 3. Tennessee Code Annotated, Section 4-5-324, is amended by designating the existing language as subsection (a) and adding the following language as subsection (b):

An administrative judge or hearing officer who hears contested cases referred to the office of the secretary of state by a public institution of postsecondary or higher education involving allegations of sexual assault, dating violence, domestic violence, or stalking shall annually participate in training that satisfies the requirements of Title IX of the Education Amendments of 1972 (20 U.S.C. § 1681), the Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act (20 U.S.C. § 1092(f)), and the federal regulations implementing those statutes, as amended.

SECTION 4. Tennessee Code Annotated, Section 10-7-504, is amended by adding the following language as a new, appropriately designated subsection:

(1) Notwithstanding any law to the contrary, information that is reasonably likely to identify a student accused of committing an alleged sexual offense or alleged violent sexual offense as defined in § 40-39-202 or any information that is reasonably likely to

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identify the victim of an alleged sexual offense or alleged violent sexual offense as defined in § 40-39-202, must be treated as confidential and not be open for inspection by members of the public.

(2) Nothing in this subsection:

(A) Limits or denies access to otherwise public information because a file, document, or data file contains information that is reasonably likely to identify a student accused of committing a sexual offense or violent sexual offense or the victim of a sexual offense or violent sexual offense; however, all information that is reasonably likely to identify a student accused of committing a sexual offense or violent sexual offense, or the victim of a sexual offense or violent sexual offense must be redacted before any access is granted to a member of the public for inspection;

(B) Prevents the district attorney general, the attorney general and reporter, or counsel for a defendant from providing to each other in a pending criminal case or appeal, where the constitutional rights of the defendant require it, information that otherwise may be held confidential under this subsection; or

(C) Limits access to records by law enforcement agencies, courts, or other governmental agencies or instrumentalities performing official functions.

SECTION 5. Tennessee Code Annotated, Title 24, Chapter 7, is amended by adding the following language as a new section:

(a) A written or oral statement of a party given in a student disciplinary proceeding concerning sexual misconduct must not be admissible in any civil or criminal trial, hearing, or proceeding for any purpose or be used for impeachment without the

informed and written consent of the party if the statement was made in a student disciplinary proceeding in which the party did not have the active assistance of counsel.

(b) This section does not create a right for a party to be represented at the expense of the public, including a public institution of higher education.

(c) This section does not require a public institution of higher education to adopt formal rules of evidence in student disciplinary proceedings that are not a contested case under the Uniform Administrative Procedures Act, compiled in title 4, chapter 5.

(d) As used in this section:

(1) "Active assistance of counsel" means the right to be represented by a licensed attorney who is allowed to fully participate in the student disciplinary proceeding or an appeal of a result of a student disciplinary proceeding;

(2) "Civil or criminal trial, hearing, or proceeding" does not include any type of civil action, counterclaim, cross-claim, or third-party complaint initiated by or against a public institution of higher education;

(3) "Fully participate" means being allowed to engage in the following conduct in a student disciplinary proceeding on behalf of a party:

(A) Make arguments to the hearing officer, including opening and closing arguments during a hearing and arguments on procedural and evidentiary issues; and

(B) Examine and cross-examine witnesses, directly or indirectly, if live witness testimony is presented;

(4) "Hearing officer" means:

(A) A hearing officer, hearing panel, or hearing board in a student disciplinary proceeding other than a contested case conducted under the Uniform Administrative Procedures Act, compiled in title 4, chapter 5; or

(B) An administrative law judge or hearing officer under the contested case provisions of the Uniform Administrative Procedures Act, compiled in title 4, chapter 5;

(5) "Party" means:

(A) A student accused of sexual misconduct; or

(B) A victim of sexual misconduct;

(6) "Student disciplinary proceeding" means a hearing, proceeding, or any other non-law enforcement process, other than an investigation, that is used by a public higher education institution to determine whether sexual misconduct occurred or to impose a sanction with respect to sexual misconduct; and

(7) "Sexual misconduct" means a violation of a public higher education institution's disciplinary policies concerning sexual assault, dating violence, domestic violence, or stalking.

SECTION 6. Tennessee Code Annotated, Section 49-7-122, is amended by deleting the section in its entirety and substituting instead the following:

(a) An employee of a public institution of higher education who investigates sexual misconduct shall complete the following at least one (1) time each year:

(1) Training that satisfies the requirements of Title IX of the Education Amendments of 1972 (20 U.S.C. § 1681), the Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act (compiled in 20 U.S.C. § 1092(f)), and the federal regulations implementing the statutes, as amended, all of which may be satisfied by the training in subdivision (a)(2); or

(2) Training developed or conducted by the Tennessee Law Enforcement Innovation Center for investigators who perform investigations of sexual misconduct.

(b) As used in this section, "sexual misconduct" means an alleged violation of a public higher education institution's policies concerning sexual assault, dating violence, domestic violence, or stalking.

SECTION 7. Tennessee Code Annotated, Title 49, Chapter 7, Part 1, is amended by adding the following language as a new section:

(a) Contested cases under the Uniform Administrative Procedure Act, compiled in title 4, chapter 5, in which a student at a public institution of higher education is charged with sexual misconduct and is subject to expulsion or a suspension of more than nine (9) days must be referred to the office of the secretary of state for hearing by an administrative judge or hearing officer employed in the office of the secretary of state. Contested cases under the Uniform Administrative Procedure Act, compiled in title 4, chapter 5, in which a student at a public institution of higher education is charged with misconduct other than sexual misconduct and is subject to expulsion or a suspension of more than nine (9) days may be referred to the office of the secretary of state for hearing by an administrative judge or hearing officer employed in the office of the secretary of state. Notwithstanding any law to the contrary, a student shall be deemed to have waived the student's right to a contested case proceeding under the Uniform Administrative Procedures Act, compiled in title 4, chapter 5, if the student fails to exercise the right to a contested case proceeding in writing within fourteen (14) calendar days after the institution sent a notice of the right to a contested case proceeding to the student.

(b) Public institutions of higher education may continue to:

(1) Appoint an administrative judge or hearing officer to conduct contested cases under the Uniform Administrative Procedures Act, compiled in title 4, chapter 5, in which the legal rights, duties, or privileges of institutional nonstudent employees or other nonstudents are at issue, subject to subsections (c) and (d); or

(2) Refer a contested case under the Uniform Administrative Procedures Act, compiled in title 4, chapter 5, in which the legal rights, duties, or privileges of institutional nonstudent employees or other nonstudents are at issue to the office of the secretary of state for hearing by an administrative judge or hearing officer employed in the office of the secretary of state.

(c) An administrative judge or hearing officer appointed by a public institution of higher education pursuant to subsection (b) must be one (1) of the following:

(1) An administrative judge or hearing officer employed by the office of the secretary of state;

(2) A licensed attorney who does not serve as an attorney for the institution;

(3) An employee of the institution who has participated in the same or a substantially similar program of training required for an administrative judge or hearing officer in § 4-5-324; or

(4) An employee of a public institution of higher education that is not involved in the contested case who has participated in the same or a substantially similar program of training required for an administrative judge or hearing officer in § 4-5-324.

(d) An administrative judge or hearing officer appointed by a public institution of higher education pursuant to subsection (b) is subject to:

(1) The disqualification provisions of § 4-5-302; and

(2) The conflict of interest provisions of § 4-5-303.

(e) No earlier than twelve (12) months prior to hearing a contested case under the Uniform Administrative Procedures Act, compiled in title 4, chapter 5, that involves sexual misconduct, an administrative judge or hearing officer shall complete a training that satisfies the requirements of Title IX of the Education Amendments of 1972 (20 U.S.C. § 1681), the Jeanne Clery Disclosure of Campus Security Policy and Campus

Crime Statistics Act (20 U.S.C. § 1092(f)), and the federal regulations implementing those statutes, as amended.

(f) As used in this section, "sexual misconduct" means a violation of a public higher education institution's policies concerning sexual assault, dating violence, domestic violence, or stalking.

(g) Nothing in this section is intended to prohibit a student charged with a student disciplinary offense from waiving the student's right to a contested case hearing under the Uniform Administrative Procedures Act, compiled in title 4, chapter 5, provided that prior to waiving that right, the student is informed in writing of the rights provided under this section.

SECTION 8. Tennessee Code Annotated, Title 49, Chapter 7, is further amended by adding sections 9 through 12 of this act as a new part.

SECTION 9. This part shall apply to all public higher education institutions located in this state.

SECTION 10. As used in this part, unless the context requires otherwise:

(1) "Institution" means any public institution of higher education located within this state;

(2) "Notice" means written information sent to a student by the institution transmitted by:

(A) United States mail, courier service, or hand delivery to the permanent or local address the institution has on file for the student; or

(B) Email to the student's institution-provided email account, but only if the institution has adopted and published a written policy establishing an institution-provided email account as a method of communication by which students should expect to receive communications from the institution about student conduct matters;

(3) "Sexual misconduct" means a violation of an institution's disciplinary policies concerning sexual assault, dating violence, domestic violence, or stalking; and

(4) "Student disciplinary proceeding" means a hearing, proceeding, or any other non-law enforcement process other than an investigation that is used by an institution to determine whether sexual misconduct occurred or impose a sanction with respect to sexual misconduct, including a contested case hearing conducted under the Uniform Administrative Procedures Act, compiled in title 4, chapter 5.

SECTION 11.

(a) An institution shall provide a student accused of sexual misconduct with notice of the extent to which the institution may allow a licensed attorney or other advisor to represent or advise the student in an investigation or student disciplinary proceeding.

(b) At least seventy-two (72) hours prior to a student disciplinary proceeding concerning charges of sexual misconduct, an institution shall provide a student accused of sexual misconduct with notice of the following:

(1) The time, place, and date of the student disciplinary proceeding;

(2) The name of each witness the institution expects to present at the student disciplinary proceeding and those the institution may present if the need arises;

(3) The student's right to request a copy of the institution's investigative file, redacted in accordance with the Family Educational Rights and Privacy Act of 1974, (20 U.S.C. § 1232g), and the federal regulations implementing that statute, as amended; and

(4) The student's right to request copies of all documents, copies of all electronically stored information, and access to tangible evidence that the

institution has in its possession, custody, or control and may use to support claims or defenses, unless the use would be solely for impeachment.

(c) When notice is sent pursuant to this section by United States mail or courier service, the notice is effective on the date that the notice is mailed or delivered to the courier service. When notice is hand delivered to the student from the institution, notice is effective on the date that the notice is delivered to the student to whom the notice is addressed. When notice is sent by email, the notice is effective on the date that the email is sent to the student's institution-provided email account.

(d) Nothing in this part is intended to prohibit a student charged with sexual misconduct from waiving the student's right to a contested case hearing under the Uniform Administrative Procedures Act, compiled in title 4, chapter 5; provided, that prior to waiving that right the student is informed in writing of the rights provided in this part.

(e) Nothing in this part prohibits the temporary suspension of a student during an institution's pending investigation of student misconduct; provided, that the terms of temporary suspension do not violate the student's constitutional right to due process of law.

SECTION 12.

(a) An institution must adopt a policy requiring that the process of disciplining a student for sexual misconduct be carried out in a manner that is free from conflicts of interest consistent with due process of law.

(b) With respect to student disciplinary hearings other than contested cases under the Uniform Administrative Procedures Act, compiled in title 4, chapter 5, the policy must provide for protections for a student accused of sexual misconduct analogous to, and no less protective than, the conflict of interest provisions of § 4-5-303.

(c) Nothing in this part prohibits an attorney for the institution from providing legal advice to multiple institutional employees who serve in different roles in the process of disciplining a student for sexual misconduct.

(d) Nothing in this part prohibits an institution from providing an alleged victim of sexual misconduct with equivalent rights as the student accused of sexual misconduct in an investigation, student disciplinary proceeding, or appeal.

SECTION 13. Tennessee Code Annotated, Section 49-8-115, is amended by adding the language "Except as provided in Section 7," before the first sentence of the section.

SECTION 14. Tennessee Code Annotated, Section 49-9-110, is amended by adding the language "Except as provided in Section 7," before the first sentence of the section.

SECTION 15. Public institutions of higher education may implement this part by promulgating emergency rules pursuant to the Uniform Administrative Procedures Act, compiled in Title 4, Chapter 5.

SECTION 16. For the purpose of promulgating rules, this act shall take effect upon becoming a law, the public welfare requiring it. For all other purposes, this act shall take effect January 1, 2018, the public welfare requiring it, and shall apply to any disciplinary or conduct rules violations that occur on or after January 1, 2018.